Filed 10/30/20 Marriage of Franecke and Melkonian CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of LOUIS FRANECKE and RITA MELKONIAN.	
LOUIS S. FRANECKE, Respondent, v. RITA MELKONIAN, Appellant.	A159776 (Marin County Super. Ct. No. FL1400242)

Rita Melkonian (Melkonian) appeals from the trial court's denial without prejudice of her request for attorney fees incurred in a prior appeal as sanctions under Family Code[1] section 271 and as need-based fees under section 2030. We dismiss her appeal of the section 271 ruling because a judgment has not been entered below following our prior remand, and the order denying her sanctions request without prejudice is not appealable. We reverse the trial court's collateral order denying Melkonian's request for pendente lite need-based attorney fees, however, and remand the matter for

[1] All further statutory references are to the Family Code unless otherwise stated.

the trial court to exercise its discretion pursuant to the factors under sections 2030 and 2032.

BACKGROUND

In a prior appeal, this court affirmed a May 2017 judgment on reserved issues in this marital dissolution action in most respects, but we reversed the judgment in part, finding that the trial court erred in ruling that Louis Franecke (Franecke) waived his right to separate property contributions to the parties' community property residence under section 2640. (*In re Marriage of Franecke* (June 28, 2019, A151670) [nonpub. opn.].) We remanded for the trial court to determine whether Franecke met his burden of proof on his claimed separate property contributions and instructed the trial court to award him any property he was owed under section 2640. Our remittitur issued August 29, 2019.

The trial court held an evidentiary hearing on the remanded matter on December 5, 2019. On December 23, 2019, the court filed and served an order after hearing on remand, finding that Franecke had not established his entitlement to reimbursement under section 2640 and denying his claims. Franecke moved for reconsideration or to vacate this order, apparently under Code of Civil Procedure sections 1008 and 473[2], and the court denied his motion on March 11, 2020.

Prior to the trial court's hearing and order on the remanded issue, Melkonian filed a Request For Order seeking sanctions and need-based attorney fees under sections 271 and 2030 for fees she incurred in A151670

[2] The record on appeal does not contain Franecke's motion papers, and the order denying the motion states that Code of Civil Procedure sections 1005 and 473 were the basis for the motion. We presume the citation to Code of Civil Procedure section 1005 was a clerical error as the order recites the standard for reconsideration under Code of Civil Procedure section 1008.

and for fees related to trial court litigation arising from a tax issue following the sale of the parties' community property residence. After a hearing, on January 8, 2020, the trial court granted part of Melkonian's request for attorney fees and sanctions with respect to litigation over the tax issue, but it denied without prejudice her request for appellate attorney's fees and sanctions.

Regarding the request for appellate attorney fees and sanctions, the trial court stated, "Before analyzing Wife's request according to the standards set forth in FC §§271 and 2030, the court will clarify what is not before it on this RFO. [¶] With respect to the request for appellate fees, although Mr. Thorndal [Melkonian's counsel] states that he requests fees only for post-judgment trial court proceedings, in his declaration he seems to be requesting fees (in the sum of $55,870) for his efforts in the appellate court with respect to Petitioner/Husband's first appeal from this court's judgment (see Exhibit A to Thorndal declaration). Mr. Thorndal also stated that he would be back in this court, seeking more fees, after the remanded issue was finalized. [¶] At oral argument, Wife stated that her request included Mr. Thorndal's fees for his work on Court of Appeal case number A151670. [¶] A151670 is not over. Mr. Thorndal has been paid for his efforts to date in A151670. The court will deal with the issue of fees in connection with that appeal when it is over. This portion of Wife's fee request is denied without prejudice."[3] Regarding Melkonian's request for other need-based attorney fees, the court found that

[3] In fact, A151670 was over after issuance of the remittitur. (*Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 774, fn. 5 [issuance of a remittitur terminates the appellate court's jurisdiction over the case and revests jurisdiction in the trial court].) However, as noted, a motion for reconsideration or to vacate the section 2640 ruling was pending before the trial court at the time of Melkonian's request for fees. We interpret the trial court's order as referring to the post-remand proceedings before it.

neither party had been candid about their income or provided all of the required documentation. Nonetheless, based on the information provided, the court determined that Franecke had a somewhat greater ability to pay attorney fees than Melkonian, enhanced by his ability to represent himself as an attorney. It ordered that Franecke pay $6,000 in section 2030 attorney fees and $5,000 in section 271 sanctions.

Melkonian filed a notice of appeal from this order on March 4, 2020.

DISCUSSION

Melkonian argues that the trial court erred in denying without prejudice her request for appellate attorney fees under sections 2030 and 271. She first contends that the court's ruling effectively barred her from seeking such fees, as she believes a renewed motion would be time-barred. She also asserts that the trial court committed reversible error in failing to exercise its discretion and consider the requisite factors under section 2030 when it denied her request for need-based appellate attorney fees. We dismiss her challenge to the trial court's section 271 ruling because it is not appealable, but we find merit in her section 2030 argument.

I. Appealability

We first address appealability. (*West v. Arent Fox LLP* (2015) 237 Cal.App.4th 1065, 1069.) The existence of an appealable order or judgment is a jurisdictional prerequisite to an appeal. (*Canandaigua Wine Co., Inc. v. County of Madera* (2009) 177 Cal.App.4th 298, 302.) If the judgment or order is not appealable, the appeal must be dismissed. (*Ibid.*) Melkonian's notice of appeal indicates an appeal under Code of Civil Procedure section 904.1, subdivision (a)(3)–(13), and, in her brief, she argues that the trial court's order denying her request for sanctions and need-based attorney fees is appealable under Code of Civil Procedure section 904.1,

subdivision (a)(2); Franecke addresses appealability only in the title page of his brief, noting that this appeal is from a postjudgment order. As explained below, we find that only part of the trial court's January 8, 2020 order is appealable.

To take an appeal from an order made after an appealable judgment, there must first be an appealable judgment. (Code Civ. Proc., § 904.1, subd. (a)(1), (2).) Our partial reversal of the May 2017 judgment and remand for further proceedings left no final judgment disposing of all the reserved issues between the parties in this case. The record contains the December 23, 2019 "Order After Hearing on Remand," but no further judgment. The January 8, 2020 order at issue thus is not appealable under Code of Civil Procedure section 904.1, subdivision (a)(2).

The court's order with respect to sanctions under section 271 is similarly not appealable under other statutory provisions. Melkonian's notice of appeal indicates an appeal from an order under Code of Civil Procedure section 904.1, subdivision (a)(3)–(13), which identifies specific appealable interlocutory orders and judgments, but she is mistaken with respect to appealability under this statute. Under subdivisions (a)(11) and (12) of the statute, a party may appeal from an interlocutory judgment or order directing the payment of sanctions in excess of $5,000, but this provision does not apply to the denial of sanctions. (See *Wells Properties v. Popkin* (1992) 9 Cal.App.4th 1053, 1055 ["[Former section] 904.1, subdivision (k) permits a party to appeal a judgment or an order directing it to pay monetary sanctions in excess of $750. [Citation.] However, denial of a motion for sanctions is not a judgment and is therefore not appealable"].) Melkonian does not identify any exception to the one final judgment rule that applies to the order denying her motion for sanctions. (See *Walker v. Los Angeles County Metropolitan*

Transportation Authority (2005) 35 Cal.4th 15, 21 [one final judgment rule is "a fundamental principle of appellate practice that prohibits review of intermediate rulings by appeal until final resolution of the case"].)

The court's denial without prejudice of Melkonian's section 271 request for sanctions also precludes appeal under the collateral order doctrine because it was not a final determination of her rights regarding such sanctions. (*In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368 (*Skelley*) [among other requirements, for the collateral order doctrine to apply, the order must be dispositive of the parties' rights in relation to the collateral matter].) The timing of an award of section 271 sanctions is left to the trial court's discretion, and these sanctions may be awarded during or at the conclusion of the litigation. (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2017) ¶ 14:265a; *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 369 [noting that sanctions under section 271 are ordinarily imposed at the end of the litigation when the extent and severity of the party's bad conduct can be judged]; *George v. Shams-Shirazi* (2020) 45 Cal.App.5th 134, 141 ["Courts have broad flexibility to award sanctions under section 271 during the course of litigation to address uncooperative behavior between the parties or 'at the end of the lawsuit, "when the extent and severity of the party's bad conduct can be judged" ' "].) As the trial court exercised its discretion to address Melkonian's sanctions request at the end of the litigation, its order was not final on this issue.

Nor are there extraordinary circumstances justifying treatment of the trial court's ruling on the section 271 sanctions issue as a writ petition. (*H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366–1367 [an appellate court has discretion to treat a purported appeal from a nonappealable order as a petition for writ of mandate in unusual and

extraordinary circumstances].) No time bar precludes Melkonian from obtaining the final ruling on her motion for sanctions that the trial court expressly stated it would render. We did not merely affirm the judgment in A151670, but instead reversed the judgment in part and remanded for further proceedings that would entail entry of a new judgment memorializing the trial court's decision regarding Franecke's entitlement to separate property contributions under section 2640. California Rules of Court, rule 3.1702(b)(1)[4] thus governs Melkonian's claim for appellate attorney fees from A151670. (*Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal.App.4th 1077, 1085 [where the appellate court reverses a judgment and remands the matter for further proceedings entailing the entry of a new judgment, rule 3.1702(b)(1) applies to the appellate attorney fees requested; rule 3.1702(c)(1) applies where the appellate court simply affirms the judgment without remanding the matter for further proceedings].) Under rule 3.1702(b)(1), absent extensions under rule 8.108, a motion to claim attorney fees for services up to and including the entry of judgment, including attorney fees on an appeal before the rendition of judgment, must be filed by the earliest of: (1) 60 days after service of a file-endorsed copy of the judgment; (2) 60 days after service of notice of entry of the judgment; or (3)

[4] All further rule references are to the California Rules of Court.

180 days after entry of the judgment.[5] Rule 3.1702(b)(1) sets an outside time limit (see *Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 468) that has not begun to run in this case because it appears the trial court has not yet entered a new judgment after the post-remand proceedings.[6]

In contrast, with respect to the trial court's order regarding pendente lite need-based attorney fees, cases have recognized that orders as to pendente lite attorney fees, including those denying such fees, constitute appealable collateral orders. (*Askew v. Askew* (1994) 22 Cal.App.4th 942, 964, fn. 37 [stating a denial of a pendente lite attorney fee request made under former Civ. Code, § 4370, subd. (a), now § 2030, subd. (a), is appealable]; *Skelley, supra,* 18 Cal.3d at p. 369 [finding an order reducing temporary spousal support and denying attorney fees constitutes an appealable collateral order]; *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 564 [stating in dicta that "where a motion for attorney fees has been denied, the moving party has in effect been directed to pay his or her own fees. Thus,

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[5] Rule 3.1702(b)(1) provides, "A notice of motion to claim attorney's fees for services up to and including the rendition of judgment in the trial court—including attorney's fees on an appeal before the rendition of judgment in the trial court—must be served and filed within the time for filing a notice of appeal under rules 8.104 and 8.108 in an unlimited civil case . . . ." Rule 8.104(a) imposes the following time limit for filing a notice of appeal: the earlier of 60 days after service of a notice of entry of judgment or a file stamped copy of the judgment, or 180 days after entry of judgment. Rule 8.108 governs extensions of the time limits in rule 8.104. (Rule 8.108(b) [extensions for valid motions for a new trial]; (c) [motions to vacate]; (d) [motions for judgment notwithstanding the verdict]; (e) [motions for reconsideration of an appealable order].)

[6] We note that Franecke has filed a notice of appeal relating to the court's post-remand denial of his request for reimbursement under section 2640 and its subsequent denial of his motion for reconsideration. We express no opinion as to whether that appeal, A160327, is premature in light of the lack of final judgment after our remand.

temporary support and attorney fee orders, whether granting or denying relief, meet the *Sjoberg* [*v. Hastorf* (1948) 33 Cal.2d 116 collateral order] test"]; *In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 110, 119 [finding appeal untimely because order awarding pendente lite attorney fees was immediately appealable]; cf. *In re Marriage of Hatch* (1985) 169 Cal.App.3d 1213 (*Hatch*) [addressing an appeal from denial of a pendente lite attorney fees request under section 2030's predecessor without discussing appealability].) In effect, Melkonian made a pendente lite request for need-based attorney fees under section 2030, the court denied this request within the 15 days required by section 2031, subdivision (a)(2), and the court conclusively indicated that it would not entertain further pendente lite requests with respect to the appeal and the remanded issue being litigated. Because the Family Code affords a party the right to seek pendente lite need-based attorney fees (§§ 2030–2032), requires the court to consider certain factors in deciding that request (§ 2030, subd. (a)(2)) and mandates an award of fees if the court finds a disparity in access and ability to pay (*ibid.*), this part of the court's order denying need-based pendente lite attorney fees is sufficiently final to constitute an appealable collateral order.

II. Attorney Fees under Section 2030

"The purpose of an attorney fees award in a marital dissolution proceeding is to provide, as necessary, one of the parties with funds adequate to properly litigate the matter." (*In re Marriage of Bendetti* (2013) 214 Cal.App.4th 863, 868.) "When a request for attorney's fees and costs is made, the court shall make findings on whether an award of attorney's fees and costs under this section is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. If the findings demonstrate disparity in

access and ability to pay, the court shall make an order awarding attorney's fees and costs." (§ 2030, subd. (a)(2).) Section 2032, subdivision (a), further provides that the court may make an award of attorney fees under section 2030 "where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties." Factors considered in determining what is "just and reasonable under the relative circumstances" include, to the extent relevant, those enumerated in section 4320 for determining spousal support. (§ 2032, subd. (b).)

The court may award attorney fees for services rendered "before or after the commencement of the [marriage dissolution] proceeding." (§ 2030, subd. (b).) The court may also "augment or modify" an award for attorney fees "as may be reasonably necessary for the prosecution or defense of the proceeding, or any proceeding related thereto, including after any appeal has been concluded." (§ 2030, subd. (c).)

A court has considerable latitude in granting or denying a pendente lite attorney fees request in family law cases, but it must render a decision on these attorney fees requests within 15 days of the hearing (§ 2031, subd. (a)(2)), and its decision must reflect consideration of the appropriate factors. (*Hatch*, *supra*, 169 Cal.App.3d at pp. 1218–1219 [interpreting section 2030's predecessor, former section 4370].) Thus, where a court denies a request for pendente lite need-based attorney fees solely because of a policy of not awarding fees until the conclusion of litigation, such denial constitutes an abuse of discretion. (*Id.* at p. 1220 [addressing denial at the outset of litigation].) We review an order under section 2030 for abuse of discretion. (*In re Marriage of Smith* (2015) 242 Cal.App.4th 529, 532.)

Melkonian argues that the trial court did not consider the appropriate factors in denying her request for pendente lite need-based appellate attorney

fees, instead stating it would not award attorney fees until the conclusion of the litigation. She is correct. The trial court's denial without prejudice resulted in a denial of Melkonian's request for appellate attorney fees pendente lite without consideration of the required statutory factors. It is true that an award of need-based fees is limited to an amount reasonably necessary to maintain or defend the proceeding. (§ 2030, subd. (a)(1).) Here, however, the trial court did not deny appellate attorney fees because they were not reasonably necessary to the conduct of the litigation; it did so because it elected not to award these fees until the end of the litigation. Indeed, the court expressly stated that it was rendering its denial "[b]efore analyzing [Melkonian's] request according to the standards set forth in [section] 2030[.]" The court's error lies in denying Melkonian's request for pendente lite appellate attorney fees without considering the factors relevant to a section 2030 determination.

III. *Appellate Sanctions*

Franecke seeks sanctions against Melkonian for a frivolous appeal. We may find an appeal frivolous "when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Melkonian's prosecution of this appeal does not warrant sanctions.

DISPOSITION

Melkonian's appeal of the trial court's ruling on her section 271 sanctions request is dismissed. The trial court's order denying Melkonian's request for need-based appellate attorney fees for A151670 is reversed and remanded to the trial court to exercise its discretion considering the factors under sections 2030 and 2032. The parties shall bear their own costs on appeal.

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BROWN, J.

WE CONCUR:

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STREETER, ACTING P. J.

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TUCHER, J.